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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 41063
Plaintiff-Respondent,)	
)	BINGHAM COUNTY NO. CR 2011-3216
v.)	
)	
BRANT LEE EVERSOLE,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BINGHAM

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District Judge

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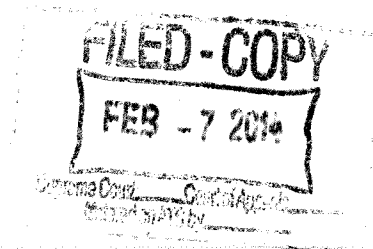


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STATEMENT OF THE CASE

Nature of the Case

Brant Lee Eversole appeals from his judgment of conviction for driving under the influence of alcohol. Mr. Eversole pleaded guilty but preserved the right to appeal from the denial of his pre-trial motions. He asserts that the district court erred by denying his motion to suppress because *State v. Diaz*, 144 Idaho 300 (2007), has been abrogated by *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552 (2013). Alternatively, if this Court believes that *Diaz* has not been abrogated by *McNeely*, Mr. Eversole asserts that *Diaz* should be overruled. He also asserts that the district court erred by denying his motion to dismiss.

Statement of the Facts and Course of Proceedings

Mr. Eversole was charged with felony Driving Under the Influence (*hereinafter*, DUI), I.C. §§ 18-8004(1)(a), 18-8005(9). (R., p.49.) He filed a motion to dismiss, asserting that the vehicle was not subject to being readily made operable at the time he was arrested. (R., p.92.) Specifically, Mr. Eversole asserted that he was stuck on a “brick burm” when law enforcement arrived and the vehicle could not be driven. (R., p.93.) The State objected, asserting that this was a determination for the jury. (R., p.107.) The district court denied the motion. (R., p.138.)

Mr. Eversole then filed a motion to suppress asserting that evidence of his blood alcohol content should be suppressed, because the search violated both the Idaho and United States Constitution. (R., p.148.) He asserted that a *per se* implied consent rule

allowing for warrantless blood draws was unconstitutional, and that the State had not demonstrated an exigency. (R., p.150.)

Mr. Eversole and the State stipulated to the facts in the motion to suppress. (R., p.170.) These facts are:

1. On April 16, 2011, Mr. Eversole was arrested for driving under the influence in Firth, in Bingham County;
2. Bingham County Sheriff's Deputy Chad Morgan alleges that Mr. Eversole was in actual physical control of a motor vehicle at the time of his arrest;
3. At the time of his arrest, Mr. Eversole refused to provide a breath sample for the purposes of determining his blood alcohol content;
4. Upon this refusal, Deputy Morgan transported Mr. Eversole to Bingham Memorial Hospital where Tiffany Henderson, a technician in the lab, drew Mr. Eversole's blood pursuant to Deputy Morgan's request; and
5. Deputy Morgan did not have a warrant for the blood draw.

(R., pp.170-21.) The district court denied the motion to suppress holding that it was bound by *State v. Diaz*, 144 Idaho 300 (2007). (R., p.173.) The parties entered into plea negotiations. (R., pp.182, 190.) Mr. Eversole then entered a binding *Alford* plea. (R., p.195.) He preserved the right to appeal any pre-trial motion. (R., p.193.)

However, Mr. Eversole subsequently filed a motion to reconsider the denial of the motion to suppress, relying on the recently-released opinion in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). (R., p.202.) The State objected, asserting that because Mr. Eversole had already entered a plea, the court lacked jurisdiction to consider the motion to reconsider. (R., p.252.)

The court denied the motion at the sentencing hearing, holding that it was still bound by *Diaz*.¹ (R., p.264.) The district court imposed a unified sentence of six years, with three years fixed, and the court retained jurisdiction. (R., p.268.) Mr. Eversole appealed. (R., p.272.)

¹ The State's assertion that the district court no longer had the authority to reconsider the suppression motion after the entry of the *Alford* plea is well taken. However, it is immaterial for purposes of the argument on appeal, as *McNeely* applies retroactively to all cases pending on direct review. See *Griffith v. Kentucky*, 479 U.S. 314 (1987).

ISSUES

1. Did the district court err when it denied Mr. Eversole's motion to suppress?
2. Did the district court err when it denied Mr. Eversole's motion to dismiss?

ARGUMENT

I.

The District Court Erred By Denying Mr. Eversole's Motion To Suppress

A. Introduction

Mr. Eversole asserts that the district court erred by denying his motion to suppress because *State v. Diaz*, 144 Idaho 300 (2007), has been abrogated by *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552 (2013). Alternatively, if this Court believes that *Diaz* has not been abrogated by *McNeely*, Mr. Eversole asserts that *Diaz* should be overruled.

B. Standard Of Review

In reviewing an order on a motion to suppress, this Court defers to the district court's factual findings unless clearly erroneous and exercises free review over the district court's determination as to whether constitutional requirements have been satisfied in light of the facts found. *State v. Donato*, 135 Idaho 469, 470 (2001).

C. The District Court Erred By Denying Mr. Eversole's Motion To Suppress

The Fourth Amendment provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." A warrantless search of the person is reasonable only if it falls within a recognized exception. See, e.g., *United States v. Robinson*, 414 U.S. 218, 224 (1973). That principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath Mr. Eversole's skin and into his veins to obtain a

sample of his blood for use as evidence in a criminal investigation. “Such an invasion of bodily integrity implicates an individual's “most personal and deep-rooted expectations of privacy.” *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552, 1558 (2013) (citing *Winston v. Lee*, 470 U.S. 753, 760 (1985); *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602, 616 (1989).

When a warrantless search or seizure has occurred, the State bears a heavy burden to justify dispensing with the warrant requirement. *Welsh v. Wisconsin*, 466 U.S. 740, 749-750 (1984); *State v. Curl*, 125 Idaho 224, 225 (1993). If evidence is not seized pursuant to a recognized exception to the warrant requirement, the evidence discovered as a result of the illegal search must be excluded as the “fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471 (1963).

In 1966, the United States Supreme Court directly addressed a blood draw as a Fourth Amendment violation. See *Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber*, the petitioner and a companion had been drinking at a bar in a bowling alley. 384 U.S. at 758 n.2. After the pair left the bowling alley, the car which the petitioner was driving skidded, crossed the road, and struck a tree. *Id.* Both the petitioner and his companion were injured and taken to the hospital for treatment. *Id.* At the hospital, a police officer directed a physician to draw a blood sample from the petitioner. *Id.* at 758. The results revealed a percent by weight of alcohol in the petitioner’s blood, which indicated intoxication, and such results were admitted at petitioner’s trial. *Id.* at 759. The petitioner objected to the admission of the results, arguing that his blood was drawn despite his refusal to consent to the test. *Id.*

The *Schmerber* Court found no Fourth Amendment violation stemming from the warrantless taking of the petitioner's blood under the unique facts of the case. Specifically, the Court relied on the destruction of blood evidence as a relevant factor in the exigency determination under the following circumstances: the officer investigating the accident encountered the defendant at the accident scene; the defendant smelled of alcohol; the passenger in defendant's car was injured and taken to the hospital; the investigating officer arrived at the hospital where defendant was being treated almost two hours after the accident; and finally, the defendant was placed under arrest. The *Schmerber* Court stated:

We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood alcohol content in this case was an appropriate incident to petitioner's arrest.

Id. at 771 (emphasis added).

However, the Court did not establish a *per se* rule:

It bears repeating, however, that we reach this judgment ***only on the facts of the present record.*** The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more ***substantial intrusions, or intrusions under other conditions.***

Id. (emphasis added).

In 1989, this Court decided *State v. Woolery*, 116 Idaho 368 (1989). The *Woolery* Court first held that the metabolism of alcohol in the blood provided an inherent emergency which justified the warrantless search. *Id.* The Court then turned to the question of whether the test results should have been excluded because the officer did

not comply with I.C. § 18-8002. *Id.* at 371. After exploring cases from other jurisdictions, this Court concluded,

The Idaho Legislature has not created a *statutory right* to refuse to submit to an evidentiary test to determine a driver's blood alcohol level. It is difficult to believe that the Idaho Legislature would provide an individual with the *statutory right* to prevent the state from obtaining highly relevant evidence when a law enforcement officer has reasonable cause to believe the individual has committed a crime – whether it would be driving under the influence, vehicular manslaughter, sale or controlled substances, or murder. *If the driver's constitutional right to be free from unreasonable searches and seizures is complied with, the state should not be prevented from obtaining such relevant evidence as the alcohol content of the driver's blood.*

Id. at 373 (emphasis added). Thus, this holding in *Woolery* is that, when the search is otherwise constitutional, I.C. § 18-8002 does not create a *statutory* right to revoke consent. This Court characterized the issue as follows: “the issue on appeal is whether the trial court erred in admitting appellant's blood alcohol content test results either because the officer requesting such test did not have reasonable grounds to administer the test or because appellant was not informed of his rights pursuant to I.C. § 18-8002.” *Woolery*, 116 Idaho at 370.

In 2002, in an appeal from a driver's license suspension, this Court held that, “every driver who drives on Idaho roads has impliedly consented to submit to a BAC when properly requested by an officer.” *Halen v. State*, 136 Idaho 829, 833 (2002). *Halen* involved only a license suspension as a result of the petitioner's refusal to take a BAC test; it was not a criminal case where the defendant sought suppression of the test. In fact, it appears that no search was done because, after *Halen* refused, he “was informed that his driver's license was being suspended based upon his refusal to submit

to a BAC.” *Id.* at 831. Halen, “never submitted to a BAC test about which to conduct discovery.” *Id.* at 835.

Building on *Halen*, in 2007, this Court decided *State v. Diaz*, 144 Idaho 300 (2007). In *Diaz*, the defendant was suspected of driving under the influence of alcohol and was transported by the arresting officer to a local hospital where his blood was drawn. *Id.* at 302. The defendant did not physically resist either being transported to the hospital or the taking of his blood, but orally protested the blood draw. *Id.* The Defendant was ultimately charged with felony DUI based on prior convictions, and he sought to suppress his blood test results, arguing that the test was involuntary and not justified by exigent circumstances. *Id.*

This Court rejected this argument, concluding that the blood draw could be justified either by exigent circumstances or consent. *Id.* The Court reasoned that because the defendant had “given his implied consent to evidentiary testing by driving on an Idaho road, he also gave his consent to a blood draw.” *Id.* at 303. Given the Court’s finding that the forcible blood draw was consensual, the Court went on to consider the reasonableness of the blood draw under the Fourth Amendment, in light of the totality of the circumstances including: (1) whether the procedure was done in a medically acceptable manner; and (2) whether the procedure was done without unreasonable force. *Id.* Finding the blood draw to be reasonable, the Court then considered whether I.C. § 18-8002(6)(b) permits officers to order involuntary blood draws absent offenses such as aggravated DUI or vehicular manslaughter. *Id.* The Court found that the statute provides no protection to drivers, but only to hospital professionals, and does nothing more than limit when an officer may request, rather

than order, hospital personnel to draw a driver's blood against the driver's will. *Id.* at 303-304.

Recently, however, the United States Supreme Court rejected the notion that a DUI investigation, by itself, justifies dispensing with the warrant requirement. *Missouri v. McNeely* 569 U.S. ___, 133 S.Ct. 1558 (2013). In *McNeely*, the respondent was validly stopped and, after declining to take a breath test, was arrested and taken to a nearby hospital for a blood draw. *Id.* at 1557-1558. At the hospital, Mr. McNeely refused to consent to the blood draw, but the officer ordered the technician to take the blood anyway. *Id.* The officer never attempted to secure a search warrant. *Id.* Mr. McNeely's blood alcohol content ("BAC") measured at .154 percent. *Id.* McNeely's suppression motion was granted and the Missouri Supreme Court affirmed the lower court's order granting suppression of the BAC results, relying on *Schmerber*. *Id.* The United States Supreme Court granted certiorari to resolve a split in the circuits as to whether "the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that it suffices on its own to justify an exception to the warrant requirement. . . ." *Id.* at 1558.

The *McNeely* Court held that it did not: "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do that." *Id.* 133 S.Ct. at 1561. The Court first recognized the importance of the privacy interest at stake, holding that "absent an emergency, no less [than a warrant] could be required where intrusions in to the human body are concerned," and that the importance of a determination by a neutral and

detached magistrate before law enforcement is allowed to “invade another’s body in search of evidence of guilt is indisputable and great.” *Id.* at 1558. The Court reiterated what was seemingly forgotten by lower courts after *Schmerber*, to determine whether an officer faced an emergency which would justify alleviating the requirement of a warrant, the Court looks to the totality of the circumstances. *Id.* at 1559.

As part of the analysis, the Court observed that the dissipation of alcohol in the blood stream is different “in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a ‘now or never’ situation.” *Id.* at 1561 (citing *Rhoaden v. Kentucky*, 413 U.S. 496 (1973)). While BAC evidence from an alleged drunk driver naturally dissipates over time, its dissipation is gradual and relatively predictable. *Id.* In addition, there is always a time gap at issue in each case where the officer has to transport the suspect to the place where the blood is to be drawn and is required to read all of the administrative license suspension warnings to each suspect. *Id.* These delays, in conjunction with advances in technology making it much easier to obtain a warrant, making the use of a *per se* rule unreasonable and violative of the Fourth Amendment. *Id.* at 1561-1562. The Court concluded, “[w]e hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.” *Id.* at 1568. *McNeely* abrogates *Woolery*’s holding that dissipation of alcohol is a *per se* exigency. *Id.* at 1558, n.2

1. The District Court Correctly Held That The State Had Failed To Demonstrate An Exigency

In this case, the district court first held that it could not conclude from the record that an exigency existed. (R., pp.177-78.) Mr. Eversole has no dispute with the court's findings in this regard. However, had the court determined that dissipation, *per se*, was an exigency, this would have been error pursuant to *McNeely*.

2. The District Court Incorrectly Held That the Blood Draw Was Valid Pursuant To Implied Consent

The district court next held, pursuant to *State v. Diaz*, that the blood draw in this case was justified by implied consent. (R., p.178.) Mr. Eversole submits that *Diaz* has been abrogated by *McNeely*. Additionally, he asserts that, if this Court believes that *McNeely* does not address the implied consent issue, *Diaz* must still be overruled.

In *McNeely*, while addressing an exigent circumstances issue, the Court held that the use of a *per se* rule was unreasonable and violative of the Fourth Amendment. *McNeely*, 133 S.Ct. at 1561-1562. However, determining that implied consent justifies the search in this case simply seeks to replace a *per se* exigency exception with a *per se* implied consent exception. This also violates the Fourth Amendment. The *McNeely* Court specifically stated, “[h]ere and in its own courts the State based its case on an insistence that a driver who declines to submit to testing after being arrested for driving under the influence of alcohol is always subject to a nonconsensual blood test without any precondition for a warrant. That is incorrect.” *Id.* at 1568. Yet, this is exactly what *Diaz* allows, albeit under the theory of implied consent.

The *McNeely* Court used a totality of the circumstances analysis because a “case-by case assessment of exigency” was the traditional test. *Id.* at 1561. The

traditional test for consent is also a totality of the circumstances test. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *State v. Christofferson*, 101 Idaho 156 (1980). Thus, the proper test for determining consent is the totality of the circumstances. The State has the burden of proving that consent was “freely and voluntarily” given. *Schneckloth*, 412 U.S. at 222 (citing *Bumper v. North Carolina*, 391 U.S. 543 (1968). “[T]he question [of] whether a consent to a search was in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.” *Schneckloth*, 412 U.S. at 227. And, “knowledge of the right to refuse consent is one factor to be taken into account.” *Id.* A blanket holding that implied consent always justifies a warrantless search where there is reasonable grounds to believe the defendant has been driving under the influence of alcohol relieves the state of this burden, because proving that consent has been “implied” does not establish that it was “freely and voluntarily” given. The Supreme Court has clearly stated that consent can be refused, which is not taken into consideration with a *per se* implied consent rule. *Id.* Idaho’s implied consent statute cannot reduce or rescind the basic and fundamental protections against unreasonable searches and seizures granted to all citizens by the Fourth Amendment to the United States Constitution. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85, 96 n.11 (1979) (state statute which purports to authorize police in some circumstances to make searches and seizures without probable cause and without search warrants falls within the category of statutes “purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches.”)

The United States Supreme Court did briefly address implied consent statutes in a section that failed to carry a majority. However, the Court did not even remotely suggest that implied consent could constitute a *per se* exception to the warrant requirement. The Court stated,

As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. See NHTSA Review 173; *supra*, at 1556 (describing Missouri's implied consent law). **Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.** See NHTSA Review 173–175; see also *South Dakota v. Neville*, 459 U.S. 553, 554, 563–564, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (holding that the use of such an adverse inference does not violate the Fifth Amendment right against self-incrimination).

McNeely, 133 S. Ct. at 1566 (emphasis added). Thus, this section of the opinion seems to take the position that States may use the penalties for withdrawing implied consent to enforce their DUI laws, not that implied consent is a *per se* exception to the warrant requirement.

Further, a recent grant of certiorari suggests that the Supreme Court believes that *McNeely* is relevant to the implied consent issue. In *Aviles v. State*, 385 S.W. 3d 110 (Ct. App. Tex. 2012), the Court of Appeals of Texas held that, despite the fact that the defendant refused testing, because the warrantless blood draw was conducted in accordance with Texas's implied consent law, there was no Fourth Amendment violation. *Id.* at 115.

The defendant filed a petition for a *writ of certiorari*, which was granted. *Aviles v. Texas*, 2014 WL 102362 (Jan. 13, 2014). The Supreme Court order states the following: “the motion for petition for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Court of Appeals of Texas, Fourth District, for further consideration in light of *Missouri v. McNeely*, 569 U.S. ____ (2013).” Thus, far from apparently endorsing implied consent laws, the Court is now granting writs of certiorari and vacating judgments that rely solely on implied consent.

Notably, the Supreme Court of Arizona recent issued an opinion in agreement with Mr. Eversole’s argument. See *State v. Butler*, 302 P.3d 609 (2013). In *Butler*, the defendant, a juvenile, admitted to officers that he had driven to school after smoking marijuana. *Id.* at 611. After being given his warnings pursuant to Arizona’s implied consent statute, the defendant “agreed verbally and in writing to have his blood drawn.” *Id.* The *Butler* Court held that, “independent of [Arizona’s implied consent statute], the Fourth Amendment requires an arrestee’s consent to be voluntary to justify a warrantless blood draw. If the arrestee is a juvenile, the youth’s age and a parent’s presence are relevant, though not necessarily determinative, factors that courts should consider in assessing whether consent was voluntary under the circumstances.” *Id.* at 613.

The court then conducted a totality of the circumstances analysis, stating,

Although Tyler did not testify at the suppression hearing, sufficient evidence supports the juvenile court’s finding that he did not voluntarily consent to the blood draw. At the time, Tyler was nearly seventeen and in eleventh grade. He had been arrested once previously, but not adjudicated delinquent. Tyler was detained for about two hours in a school room in the presence of school officials and a deputy. Neither of his

parents was present. Tyler initially was shaking and visibly nervous. When he became loud and upset after being told he was being arrested, the deputy placed him in handcuffs until he calmed down. A second deputy sheriff arrived before the blood draw was taken. After removing the handcuffs, the first deputy read the implied consent admonition to Tyler, once verbatim and once in what the deputy termed “plain English,” concluding with the statement, “You are, therefore, required to submit to the specified tests.” Tyler then assented to the blood draw.

Id. at 613-14. The court thus concluded that, despite the implied consent statute and the fact that the defendant assented to the draw, there was no abuse of discretion by the juvenile court in its determination that the defendant’s consent was involuntary. *Id.*

In sum, because *McNeely* rejects *per se* rules in favor of a totality of the circumstances test, the district court was incorrect in its conclusion that the blood draw in this case did not violate the Fourth Amendment and Article I, § 17 of the Idaho Constitution. The State has not shown, based on a totality of the circumstances, that Mr. Eversole freely and voluntarily consented to the blood draw. In fact, the record reveals that he refused testing. The decision of the district court should therefore be reversed.

3. *Diaz* And Any Other Case That Holds That Implied Consent By Itself Justifies A Blood Draw Should Be Overruled

Mr. Eversole asserts that, even if this Court concludes that *McNeely* does not abrogate *Diaz*, *Diaz* and any other case that holds that Idaho motorists have impliedly consented to involuntary blood draws if law enforcement has reasonable suspicion that the motorist is under the influence of an intoxicating substance should be overruled. It is well recognized that the doctrine of *stare decisis* need not be strictly adhered to if the precedent in question is manifestly wrong, has proven over time to be unjust or unwise, or if overruling it is necessary to vindicate plain, obvious principles of law and remedy

continued injustice. *State v. Humphreys*, 134 Idaho 657, 8 P.3d 652, 655 (2000) (quoting *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990)). Mr. Eversole asserts that *Diaz* was manifestly wrong and should be overruled.

According to *Diaz*, by obtaining a driver's license, Idaho motorists have impliedly consented to involuntary blood draws if law enforcement has reasonable suspicion that the motorist is under the influence of an intoxicating substance. To the extent *Diaz* holds that Idaho's implied consent statute creates a *per se* rule that suffices on its own as an exception to the warrant requirement, it cannot comport with the Fourth Amendment.

As is set forth above, the Fourth Amendment requires consent to be demonstrated by the totality of the circumstances. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *State v. Christofferson*, 101 Idaho 156 (1980). The State has the burden of proving that consent was "freely and voluntarily" given. *Schneckloth*, 412 U.S. at 222 (citing *Bumper v. North Carolina*, 391 U.S. 543 (1968)). "[T]he question [of] whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth*, 412 U.S. at 227. And, "knowledge of the right to refuse consent is one factor to be taken into account." *Id.* Idaho's implied consent statute cannot reduce or rescind the basic and fundamental protections against unreasonable searches and seizures granted to all citizens by the Fourth Amendment to the United States Constitution. See, e.g., *Ybarra v. Illinois*, 444 U.S. 85, 96 n.11 (1979) (state statute which purports to authorize police in some circumstances to make searches and seizures without probable cause and without search warrants falls within

the category of statutes “purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches.”)

Further, consent can be withdrawn at any time. See *Schneckloth*, 412 U.S. at 227, *Florida v. Jimeno*, 500 U.S. 348 (1991) (holding that a suspect may “delimit as he chooses the scope of the search to which he consents,” in the context of a vehicle search); *United States v. McWeeney*, 454 F.3d 1030 (9th Cir. 2006) (holding that, “a suspect is free ... after initially giving consent, to delimit or withdraw his or her consent at any time,” in the context of a stop and frisk); *United States v. Sanders*, 424 F.3d 768 (8th Cir. 2005) (“Once given, consent to search may be withdrawn.”); *United States v. Lockett*, 406 F.3d 907 (3rd Cir. 2005) (recognizing that a suspect retains the right to revoke his consent in the context of a luggage search); *United States v. Marshall*, 348 F.3d 281 (1st Cir. 2003) (same, in the context of a home search); *United States v. Bustillos-Munoz*, 235 F.3d 505 (10th Cir. 2000) (same, in the context of a vehicle search); *United States v. McFarley*, 991 F.2d 1188 (4th Cir. 1993) (same, in the context of a luggage search). Mr. Eversole submits that irrevocable implied consent cannot exist in Fourth Amendment jurisprudence.

By holding that I.C. § 18-8002 provides for consent, by itself, this Court has abandoned the totality of the circumstances test required by *Schneckloth*. And, based upon the fact that this Court noted that the defendant in *Diaz* refused the testing, this Court appears to hold that implied consent cannot be withdrawn. These conclusions are manifestly wrong in light of clear United States Supreme Court precedent regarding the State’s burden to prove consent. Thus, *Diaz* must be overruled.

II.

The District Court Erred By Denying Mr. Eversole's Motion To Dismiss

A. Introduction

Miindful of the district court's factual findings, Mr. Eversole asserts that the district court erred by denying his motion to dismiss.

B. Standard Of Review

This Court defers to the district court's factual findings unless clearly erroneous and exercises free review over the application of the law to the facts. *State v. Donato*, 135 Idaho 469, 470 (2001).

C. The District Court Erred By Denying Mr. Eversole's Motion To Dismiss

Mr. Eversole filed a motion to dismiss, asserting that his vehicle was not subject to being readily made operable at the time he was arrested. (R., p.92.) Specifically, Mr. Eversole asserted that he was stuck on a "brick burm" when law enforcement arrived and the vehicle could not be driven. (R., p.93.) The State objected, asserting that this was a determination for the jury. (R., p.107.)

Mr. Eversole's motion was based on *State v. Adams*, 142 Idaho 305 (Ct. App. 2005). In *Adams*, the Court of Appeals held,

The "actual physical control" portion of the DUI statute presupposes the presence of a vehicle that can be controlled. The threat that is targeted by this part of the DUI statute is the danger that a parked vehicle will be put in motion by an intoxicated occupant and thereby pose a risk to the safety of the occupant and others. This targeted risk does not exist when the vehicle is not operable, nor subject to being readily made operable, nor in motion (whether by coasting or being pushed), nor at risk of coasting. If a vehicle cannot be moved it is not a motor vehicle capable of being "controlled," and the reason for the statutory prohibition does not exist.

Consequently, the statute is not violated when the vehicle is not in motion or susceptible of easily being placed in motion.

Id. at 308. The court stated, “when there is evidence from which a fact-finder could sensibly conclude that the vehicle was reasonably capable of being rendered operable, the issue is for the jury.” *Id.*

The court concluded that the State had established that the defendant was seated in the driver’s seat of his vehicle with the motor running, but there was no direct evidence that the vehicle was capable of moving, nor any circumstantial evidence from which operability could be inferred. *Id.* The defendant had asserted that the vehicle was nonfunctional due to transmission problems.

The district court made the following factual findings at the evidentiary hearing:

In this case, the evidence is that the defendant’s vehicle was stuck on a [burm] in front of Collet’s Bar in Firth, Idaho, which is in Bingham County; that the officer saw the vehicle stuck on the [burm]. Two individuals were attempting to help get him off the [burm], and the wheels were spinning when he made contact. He also testified that, with some assistance, the vehicle could have been removed from the [burm].


(Tr., p.21, Ls.4-12.). The court concluded that this was akin to having a flat tire or a dead battery, and that “it was just a matter of getting a little more time to get [the vehicle] off of the [burm]. (Tr., p.21, Ls.21-25.) Therefore, the court denied the motion, holding that the question of operability was for the jury.

Mindful of the fact that, “when there is evidence from which a fact-finder could sensibly conclude that the vehicle was reasonably capable of being rendered operable, the issue is for the jury,” Mr. Eversole submits that the district court erred by denying his motion to dismiss because the vehicle was not operable on the burm.

CONCLUSION

Mr. Eversole respectfully requests that this Court reverse the district court's orders denying his motion to suppress and motion to dismiss and remand this case for further proceedings.

DATED this 7th day of February, 2014.



JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of February, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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